(13)

No. 96-643

IN THE

Supreme Court of the United States

October Term, 1996

THE STEEL COMPANY, a/k/a
CHICAGO STEEL AND PICKLING COMPANY,
Petitioner,

v.

CITIZENS FOR A BETTER ENVIRONMENT,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

Whether, in enacting the citizen suit provision of the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11046, Congress intended to authorize citizens to seek penalties for violations that were cured before the citizen suit was filed, thereby granting EPCRA citizen suit plaintiffs greater enforcement authority than that granted to other citizen suit plaintiffs under other federal environmental statutes.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of petitioner, The Steel Company. Written consent for amicus participation in this case was granted by counsel for all parties and lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt organization incorporated under the laws of California for the purpose of participating nationally in litigation matters affecting the public interest. PLF has over 20,000 supporters nationwide. PLF policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. The Board of Trustees evaluates the merits of any contemplated legal action and authorizes such action only when PLF's position has broad support within the general community. PLF's Board of Trustees has authorized the filing of a brief amicus curiae in this matter.

PLF has a long-standing interest in environmental issues and has participated in numerous cases involving statutory interpretation of federal environmental laws. For example, PLF was a party of record in *Pacific Legal Foundation v. Andrus*, 657 F.2d 829 (6th Cir. 1981). PLF also participated as amicus curiae in this Court in *Bennett v. Spear*, Supreme Court No. 95-813; *Douglas County, Oregon v. Babbitt*, Supreme Court No. 95-371; *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, __ U.S. __, 115 S. Ct. 2407 (1995); and *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989).

The Seventh Circuit ruling in this case, authorizing citizen enforcement of wholly past reporting violations under the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 42 U.S.C. § 11001, *et seq.*, conflicts with this Court's unanimous decision in *Gwaltney of Smithfield, Ltd. v.*

Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1987), and is contrary to the intent of Congress.

At issue in this case is not only the plain meaning of the citizen suit provision of EPCRA, but also the policy interests behind such provisions. Whereas this Court held in *Gwaltney* that citizen suits (with forward-looking preenforcement notice requirements) are authorized to support, but not supplant, government enforcement of environmental laws, the Seventh Circuit reasoned the main purpose of such citizen suits is to reward citizen enforcers.

PLF's public policy perspective and litigation experience in support of rational environmental protection and economic rights will provide a necessary viewpoint on the issues presented in this case.

STATEMENT OF THE CASE

The question presented in this case is whether Congress intended to authorize citizens, under EPCRA, to seek penalties for violations that were cured before the citizen suit was filed. The facts that give rise to this question follow.

The Steel Company (Company) is a minority-owned steel manufacturer and pickler in Chicago, Illinois. The Company started in 1971 and employs about 55 people. The Company is subject to EPCRA which requires, among other things, the annual submission of chemical inventory and release forms to federal, state, and local entities pursuant to Sections 312 and 313. On March 16, 1995, Citizens for a Better Environment (Citizens), an environmental citizen group, sent an EPCRA 60-day notice of intent to sue to the United States Environmental Protection Agency (EPA), the state, and the Company alleging the Company had never filed the requisite forms. Before the 60-day notice period had run, the Company filed the forms with the EPA. EPA chose not to pursue any enforcement action but,

notwithstanding the filing, Citizens filed suit in the Northern District Court of Illinois seeking, among other things, civil penalties in the amount of $537,500,000 against the Company.

A few days before Citizens filed suit, the Sixth Circuit held, on facts indistinguishable from this case, that private citizens could not sue for past EPCRA violations. *Atlantic States Legal Foundation v. United Musical, Inc.*, 61 F.3d 473 (6th Cir. 1995). Based on the Sixth Circuit's opinion, the Company's motion to dismiss was granted. Citizens appealed, and on July 23, 1996, the Seventh Circuit reversed.

Although the Seventh Circuit noted the District Court's reliance on *United Musical* was not misplaced, and that *United Musical* relied on *Gwaltney*, the court nevertheless rejected the Sixth Circuit holding. In *Gwaltney*, this Court considered the 60-day notice provision for citizen suits under the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, and unanimously held the purpose of the provision is to allow the alleged violator to come into compliance, thus making a citizen suit unnecessary. According to this Court, the power to sue for penalties based on past violations rested solely with the government. In this case, however, the Seventh Circuit reasoned it is more important to reward citizen groups financially for their enforcement efforts.

SUMMARY OF THE ARGUMENT

Congress struck a balance between citizen enforcement under environmental statutes and burdening the federal courts with excessive citizens suits. This goal is achieved through the 60-day notice provision which allows the alleged violator to come into compliance and the government to enforce the law so as to obviate the need for a citizen suit. The lower court decision in this case, however, upsets that balance. It nullifies EPCRA's 60-day notice provision and undercuts the government's enforcement discretion by authorizing citizen

suits after the alleged violator has complied and the government chooses not to seek civil penalties.

The lower court decision misinterprets the language of EPCRA and contradicts this Court's unanimous ruling in *Gwaltney*. In that case, this Court held if citizen suits may target wholly past violations, the notice requirement becomes gratuitous. This Court also held that the citizen suit is meant to supplement rather than supplant government action. Contrary to the intent of Congress, the lower court decision encourages excessive lawsuits. In the Seventh Circuit, virtually anyone may bring a retroactive citizen suit under EPCRA, asserting staggering civil liability--like the $573,500,000 claim filed against the Steel Company in this case--to force a lucrative monetary settlement with the plaintiff. These after-the-fact lawsuits provide no environmental benefit but enrich the plaintiff and encourage opportunistic lawsuits. This form of legalized extortion could not have been the intent of Congress.

Contrary to the Seventh Circuit in this case, the Sixth Circuit in *United Musical* concluded the plain language and structure of EPCRA leads to the conclusion that citizen plaintiffs may not bring actions that seek civil penalties for purely historic violations. The Sixth Circuit is in accord with *Gwaltney* and has the better analysis. Contrasting the Sixth and Seventh Circuit analyses is instructive. This Court should uphold the policy rationale it expressed in *Gwaltney* for citizen suits reverse the ruling below in this case.

ARGUMENT

I

CONGRESS STRUCK A BALANCE BETWEEN CITIZEN ENFORCEMENT AND BURDENING THE FEDERAL COURTS

In crafting the citizen suit provision of environmental laws, Congress sought to "strike a balance between

encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits." *See Hallstrom v. Tillamook County*, 493 U.S. at 29 (analyzing the legislative history of the citizen suit provision of the Clean Air Amendments of 1970, which served as the precursor to analogous citizen suit provisions in other environmental laws, including the Clean Water Act, the Resource Conservation and Recovery Act, and the Emergency Planning and Community Right-to-Know Act). This Court stated in *Hallstrom*:

> Requiring citizens to comply with the [60-day] notice and delay requirements serves this congressional goal in two ways. First, notice allows Government agencies to take responsibility for enforcing environmental regulations, thus obviating the need for citizen suits. See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 60, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987) ("The bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than to supplant governmental action"). In many cases, an agency may be able to compel compliance through administrative action, thus eliminating the need for any access to the courts. ... Second, notice gives the alleged violator "an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit." *Gwaltney*, 484 U.S. at 60.

Hallstrom, 493 U.S. at 29.

The decision below, allowing citizen suits for purely past violations, frustrates this congressional policy to avoid unnecessary litigation and unsettles the balance Congress sought between encouraging citizen enforcement and avoiding

burdening the federal courts with excessive suits. The Seventh Circuit decision nullifies the purpose of the 60-day notice provision and interferes with the government's enforcement discretion.

A. The Lower Court Decision Nullifies the 60-Day Notice Provision

In *Gwaltney*, this Court considered whether the citizen suit provision in the Clean Water Act (CWA), which is strikingly similar to the citizen suit provision in EPCRA, authorized citizen suits for wholly past violations. This Court determined the Act did not confer such jurisdiction citing, among other things, the forward-looking language, and the purpose of the citizen suit provision.

This Court stated one of the most striking indicia of the prospective orientation of the citizen suit is the pervasive use of the present tense. *Gwaltney*, 484 U.S. at 59. By way of example, this Court cited the notice provision of the Clean Water Act that citizen-plaintiffs must give notice to the alleged violator, the administrator of the EPA, and the state in which the violation "occurs." *Id.* at 59. This Court's present tense interpretation of the word "occurs" stands in stark contrast to the interpretation given this same word in the notice provision of EPCRA by the Seventh Circuit. The Circuit Court minimized the present tense character of the term "occurs" by suggesting another term "is occurring," which was also found in the Clean Water Act, but not in EPCRA, categorically distinguished *Gwaltney* from this case. This hypertechnical parsing of the language of the statute, however, is contrary to a plain reading of the law. The Seventh Circuit's holding that the enforcement provisions of EPCRA, including the word "occurs," are not likewise cast in the present tense and, consequently, are not limited to a prospective orientation is wrong. *Citizens for a Better Environment v. Steel Company*, 90 F.3d 1237, 1244 (Th Cir. 1996) (*Citizens*).

The Seventh Circuit compounded its error in this case by flatly rejecting this Court's policy rationale for disallowing citizen suit actions for wholly past violations.

In *Gwaltney*, this Court reasoned retroactive citizen suits would render incomprehensible the CWA notice provision that requires citizens to give 60-day's notice of their intent to sue to the alleged violator as well as to the administrator of the EPA and the state. *Gwaltney*, 484 U.S. at 59. "If the Administrator or the State commences enforcement action within that 60-day period, the citizen suit is barred, presumably because governmental action has rendered it unnecessary." *Id.* According to this Court, it follows logically that "the purpose of notice to the alleged violator is to give it an opportunity to bring itself into compliance with the Act and thus likewise render unnecessary a citizen suit." *Id.* at 60. In a unanimous opinion, this Court stated: "If we assume, as respondents urge, that citizen suits may target wholly past violations, the requirement of notice to the alleged violator becomes gratuitous." *Id.*

EPCRA has the same notice requirement as the CWA. The Seventh Circuit ruling, that citizen suits under EPCRA may target wholly past violations, makes the requirement of notice to the alleged violator gratuitous.

B. The Lower Court Decision Undercuts the Government's Enforcement Discretion

Aside from making the notice requirement gratuitous, retroactive citizen suits would create a second and even more disturbing anomaly. This Court pointed out that the bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than supplant government action. *Id.* "Permitting citizen suits for wholly past violations of the Act could undermine the supplementary role envisioned for the citizen suit." *Id.* To illustrate this danger, this Court posed a hypothetical.

Suppose the administrator of the EPA identified a violator and issued a compliance order. *Id.* "Suppose further that the Administrator agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take." *Id.* at 60-61. "If citizens could file suit, months or years later, in order to seek the civil penalties the Administrator chose to forego, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably." *Id.* at 61.

In the decision below, the Seventh Circuit acknowledged that the Administrator has discretion to determine the level of civil penalties, if any, assessed in a particular case. That determination may be based on various factors, including the seriousness of the violation, the violator's "attitude," and other factors. *Citizens*, 90 F.3d at 1241. However, the lower court has failed to realize the significance of this discretion.

The Environmental Protection Agency has determined it is sometimes in the public interest to forego penalties altogether. An early statement of EPA policy recognized that civil penalties may not be appropriate in the unusual situation where the violator is not negligent. Environmental Protection Agency Civil Penalty Policy (February 16, 1984) at 24. The purposes of deterrence and punishment are not fulfilled by making an innocent violator pay civil penalties or incur additional attorneys' fees.

Not all violations of EPCRA's reporting requirements are willful. The Seventh Circuit observed in this case that "[m]any industrial companies subject to the Act remained unaware of its existence long after it went into effect" in 1986. *Citizens*, 90 F.3d at 1238. Whether it serves the public interest in a particular case, such as this case, to pursue penalties should be left in the hands of the agency tasked with the responsibility to enforce the Act. That decision should not be left in the hands

of special interest plaintiffs who invariably seek to maximize penalties, as attested by Citizens' $573,500,000 claim in this case, without regard for culpability or actual harm to the environment.

In *Gwaltney*, this Court concluded that an interpretation of the scope of the citizen suit provision of the Act, allowing citizen suits for past violations, would change the nature of the citizen's role from interstitial to potentially intrusive. *Id.* "We cannot agree that Congress intended such a result." *Id.*

This Court's policy rationale for limiting the scope of the citizen suit provision of the CWA applies equally to EPCRA. EPCRA contains a prohibition on citizen suits when the government acts; the notice provision of EPCRA contains forward-looking language; and, the legislative history does not suggest a contrary congressional intent.

The lower court rejected this Court's policy considerations based on an amendment to an act other than EPCRA. The Seventh Circuit held the reasoning of this Court is no longer as compelling as it was when *Gwaltney* was decided because, since then, Congress amended the Clean Air Act, to permit citizen enforcement actions for past violations, yet left the notice provision intact. *Citizens*, 90 F.3d at 1244. The Seventh Circuit apparently believes that when Congress amended the Clean Air Act to explicitly allow citizen suits for past violations any statute with a similar notice provision, like EPCRA, had been implicitly altered as well. Other environmental statutes that contain similar notice provisions, and which this Court has concluded authorize only prospective relief, include the Clean Water Act, the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, *et seq.*, and the Toxic Substances Control Act, 15 U.S.C. § 2601, *et seq.* *Gwaltney*, 484 U.S. at 57. The implication that these acts have also been changed by amendment of the Clean Air Act is unreasonable. A more reasonable implication is that Congress consciously chose to maintain the rule of *Gwaltney* for the Clean Water Act

and EPCRA. All the amendment of the Clean Air Act shows is that Congress knows how explicitly to authorize citizen suits for wholly past violations, in particular situations, when it intends to do so. *See id.* Congress never explicitly authorized such citizen suits in EPCRA.

C. The Lower Court Decision Encourages Excessive Citizen Suits

In place of, and totally contrary to, the policy rationale applied by this Court in *Gwaltney*, the Seventh Circuit suggested a rationale that seeks foremost to reward citizen enforcers financially. The Seventh Circuit held EPCRA creates a structure that encourages private citizens to invest the resources necessary to uncover violations of the Act by allowing courts to award the costs of enforcement to substantially prevailing parties. *Citizens*, 90 F.3d at 1244. If citizen suits could be fully prevented, the court argues, by completing and submitting forms, however late, citizens would have no real incentive to incur the costs of learning about EPCRA, investigating suspected violators, and analyzing information. *Id.* Put simply, the court stated, if citizens can't sue, they can't recover the costs of their efforts. *Id.* "Private enforcement of the reporting requirements would undoubtedly drop off." *Id.* at 1245.

This rationale overlooks the very real probability that, in cases involving "reporting requirements," the cost of determining who the violators are may be little more than the cost of a Freedom of Information Act request to the EPA. Most of the "reward" to the plaintiff from the citizen suit is likely to reflect the totally unnecessary costs of the litigation.

The Seventh Circuit also overlooks that EPCRA, like the CWA, contains a provision that bars citizen suits when the government chooses to enforce the Act. 42 U.S.C. § 11046(e). If the government exercises its enforcement discretion, citizens cannot bring a suit and recover their costs anyway. Therefore,

limiting citizen suits to prospective relief leaves citizens no worse off than if the government chooses to act, and the government has discretion to act in all cases. To achieve, in all cases, the ends suggested by the Seventh Circuit--to reward citizens for their enforcement efforts--EPCRA would have to be read to authorize a citizen suit every time a citizen sends a notice of intent to sue, even if the government pursues a discretionary enforcement action. Clearly, Congress did not intend such a result.

The Seventh Circuit laments that if citizen suits are not allowed for wholly past violations under EPCRA, citizen suits could only proceed when a violator receives notice of intent to sue and still fails to comply. *Citizens*, 90 F.3d at 1244. That is correct. To avoid unnecessary lawsuits, that is precisely what Congress intended.

Under Sections 312 and 313 of EPCRA, civil penalties can amount to $25,000 per violation. Each day is a separate violation. *Citizens*, 90 F.3d at 1241. Nevertheless, as previously noted, the Seventh Circuit observed in this case, "[m]any industrial companies subject to the Act remained unaware of its existence long after it went into effect" in 1986. *Id.* at 1238. The EPA estimated that of the approximately 30,000 facilities required to submit Section 313 forms, over one-third had not. General Accounting Office, EPA's Toxic Release Inventory Is Useful but Can Be Improved, at 49 GAO/RCED 91-121 (June, 1991). Additionally, according to an EPA report sent to the Office of Management and Budget, specified annual reporting requirements under EPCRA Sections 311 and 312 potentially affect 866,285 facilities. 60 Fed. Reg. 35,201. For those facilities that are still unaware of EPCRA, the potential liability is immense. Indeed, Citizens allege the Company in this case was out of compliance for approximately eight years and is liable for penalties of $537,500,000. Complaint at 23, 30.

The allure of tens of thousands of potential defendants with such huge potential liability is irresistible to opportunistic plaintiffs. Plaintiffs, such as Citizens in this case, can and do use the threat of a lawsuit to coerce lucrative settlements from alleged violators--settlements that benefit the plaintiffs. Citizens are quite proud of this fact and readily admit that those companies that don't settle with them will be "punished" with a lawsuit.

> In the event that CBE is unable to settle the matter, it files court actions seeking penalties to be paid to the United States Treasury to *punish* non-complying companies and other companies from ignoring EPCRA.

Opening Brief for Plaintiff-Appellant, Citizens for a Better Environment, in the United States Court of Appeals for the Seventh Circuit at 9-10 (emphasis added).

Citizens have found a court-endorsed means of exploiting a lucrative new market in citizen suits. The threat of a lawsuit to "punish non-complying companies" with exorbitant penalties is a great incentive to "settlement" with plaintiffs, wherein the plaintiffs, and not the government, receive money from the defendant to ward off a lawsuit. Moreover, under the lower court decision, plaintiffs need not have even precipitated compliance of a delinquent business to use the threat of a lawsuit to extort money and operational concessions from the business. Plaintiffs need only become aware of a late filing of the requisite EPCRA forms, then sue.

The Seventh Circuit has forgotten, however, that the paramount objective of citizen suits is to encourage compliance and assist, not replace, government law enforcement. That is the theme pervading this Court's ruling in *Gwaltney*. However, the Seventh Circuit would convert that objective to a form of vigilante justice by encouraging citizen lawsuits that cannot further environmental protection (because the infraction has

already been cured) but serve only to burden the federal courts with excessive citizen suits, punish regulated parties, and reward citizen-plaintiffs. This disturbs the very balance Congress tried to achieve through the citizen suit in the first place.

II

EPCRA DOES NOT AUTHORIZE CITIZEN SUITS FOR PAST VIOLATIONS

Contrary to the Seventh Circuit in this case, in *United Musical* the Sixth Circuit held, "the plain language and structure of EPCRA lead us to conclude that citizen plaintiffs may not bring actions that seek civil penalties for purely historic violations." *United Musical*, 61 F.3d at 478. The Seventh Circuit in this case expressly rejected the Sixth Circuit analysis. *Citizens*, 90 F.3d at 1242 n.1. However, the Seventh Circuit ruling is not supported by the plain meaning of the Act, the legislative history, or the policy objectives of such citizen suits. The Sixth Circuit has the better analysis. Contrasting these differing opinions is instructive.

In *United Musical*, the Atlantic States Legal Foundation sent United Musical Instruments a notice of intent to sue for that company's failure to submit the chemical release reporting forms required by Section 313 of EPCRA. Within the 60-day notice period, the company submitted the forms. Yet, the foundation sued the company in federal District Court for the past violation. The District Court dismissed the case as time-barred. On appeal, the Sixth Circuit upheld the dismissal because EPCRA does not allow citizen suits for past violations that have been cured by the date the action commences. *United Musical*, 61 F.3d at 475.

To reach this conclusion, the court looked first at the language of the statute and found Congress could have phrased its requirements in language that looked to the past but it did not choose this readily available option. *Id.* at 477. Rather, the

court determined the most natural reading of the citizen suit provision of EPCRA weighs against allowing citizen suits for purely historical violations. *Id.* The court then looked at the legislative history of EPCRA and determined there is nothing indicating Congress intended to allow citizens to sue for past violations. *Id.*

Another decisive factor in the court's determination was this Court's discussion in the *Gwaltney* opinion concerning the role of citizen suits in the Clean Water Act. The court noted that EPCRA, like the Clean Water Act, prohibits citizen suits once EPA has commenced an enforcement action. In *Gwaltney*, this Court stated the bar on citizen suits when government enforcement action is under way suggests citizens suits are meant to supplement rather than supplant governmental action and that Congress could not have intended a contrary result. *Gwaltney*, 484 U.S. at 60.

But, contrary to the Sixth Circuit finding in *United Musical*, the Seventh Circuit found the citizen suit provision of EPCRA does look to the past. However, where the Sixth Circuit required explicit congressional language allowing citizen suits for historical violations, the Seventh Circuit was satisfied with something much less.

For example, the Seventh Circuit noted EPCRA authorizes citizens to sue "for failure to" comply with the statute. The court then maintained this ambiguous reference "can indicate a failure past or present." *Citizens*, 90 F.3d at 1243. The Seventh Circuit also noted that notice of intent to sue must be given to the EPA, the alleged violator, and "'the State in which the alleged violation occurs.'" *Id.* at 1244. Although the term "occurs" in the notice provision clearly connotes something ongoing, the Seventh Circuit unabashedly maintained EPCRA contains no language to indicate that citizens must allege an ongoing violation. *Id.*

Aside from its strained reading of the statutory language, the Seventh Circuit cites nothing in the legislative history of EPCRA to justify its conclusion that EPCRA authorizes citizen suits for past violations. Rather, the court infers Congress intended to allow such suits when it amended the Clean Air Act. *Citizens*, 90 F.3d at 1244.

In 1990, Congress amended the Clean Air Act to allow citizen enforcement actions for historical violations, but left the notice provision intact. According to the Seventh Circuit, the rationale behind *Gwaltney*--that allowing citizens to sue after violations ceased would defeat the purpose of the notice provision and undercut the EPA's enforcement discretion--becomes less compelling when considered in light of this amendment to the Clean Air Act. *Id.* But the Sixth Circuit had a response to that argument.

In *United Musical*, the court acknowledged this argument has a certain logic but determined it is unpersuasive since one can argue with equal force that by amending the Clean Air Act, but not amending EPCRA, Congress intended to limit EPCRA's citizen suit provision to violations existing at the time the suit is filed. *United Musical*, 61 F.3d at 477. In fact, the Sixth Circuit correctly concluded that in the absence of explicit congressional language mandating such a result--as in the amended Clean Air Act--the court must reject the argument. *Id.*

Finally, the Seventh Circuit considered the purpose of the citizen suit provision and concluded the provision must be interpreted to reward citizens for their enforcement efforts. *Citizens*, 90 F.3d at 1244. According to the lower court, allowing citizen suits for past violations would advance this purpose. *Id.* However, nothing in either the act or the legislative history suggests the purpose of the EPCRA citizen suit provision is to reward or otherwise finance opportunistic legal challenges. The Seventh Circuit's view of the purpose of citizen suits is contrary to good public policy and runs counter

to the view adopted by this Court in *Gwaltney* that citizen suit provisions, like the provision in this case, are intended to only supplement, but not replace, the enforcement efforts of the government.

CONCLUSION

The Seventh Circuit ruling is not supported by the plain meaning of the Act, the legislative history, or the policy objectives of such citizen suits. The lower court decision serves only to encourage citizen litigation for profit--a form of legalized extortion. That was never the intent of Congress. Rather, a plain reading of EPCRA and similar environmental statutes suggests the purpose of citizen suits is to assist, not replace, discretionary government enforcement. This Court should overturn the decision below.

DATED: April, 1997.

Respectfully submitted,

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This brief *amici curiae* of the American Iron & Steel Institute, *et al.*, is submitted in support of Petitioner The Steel Company. Like Petitioner, *amici* submit that the opinion of the United States Court of Appeals for the Seventh Circuit in *Citizens for a Better Environment v. The Steel Co.*, 90 F.3d 1237 (7th Cir. 1996) (reproduced at Pet. App. 1a-17a) is erroneous and should be reversed.

The court of appeals' decision concerns the reporting provisions of sections 312 and 313 of the Emergency Planning and Community Right-To-Know Act ("EPCRA"), 42 U.S.C. §§ 11022 and 11023, and raises the question of whether a private enforcement action ("citizen suit") under section 326 of EPCRA, 42 U.S.C. § 11046, is authorized against a defendant who, as all in this case agree, filed the reports required under sections 312 and 313 *prior* to commencement of the underlying citizen suit by the Respondents, Citizens for a Better Environment, *et al.* ("CBE"). The Seventh Circuit's decision allows a federal court to hear an EPCRA citizen suit under section 326 even where the defendant completely cured the alleged violation -- failure to complete and file certain environmental reporting forms -- prior to the initiation of suit. That decision contravenes Congress's intent that the statutorily-required pre-suit notice under EPCRA (and similar environmental statutes) would allow alleged violators to cure such violations without the need for recourse to the courts. The Seventh Circuit's interpretation of EPCRA section 326 not only conflicts with the Sixth Circuit's decision in *Atlantic States Legal Foundation, Inc. v. United Musical Instruments, U.S.A., Inc.*, 61 F.3d 473 (6th Cir. 1996), but also with this Court's decisions in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), and *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989). The latter cases involved the citizen suit provisions of the Clean Water Act and Resource Conservation and Recovery Act, respectively. This Court's rulings in each case are clearly at odds with the Seventh Circuit's interpretation of the directly analogous provisions of section 326 of EPCRA. [1/]

[1/] On April 27, 1997 President Clinton announced that EPA will finalize expansion of EPCRA section 313 reporting to thousands of new facilities in seven additional industrial sectors, which will encompass many small businesses. *Daily Environmental Reporter* (BNA) (Apr. 23, 1997) at AA-1. EPA intends to extend EPCRA reporting requirements to other industrial categories in the future. The citizen suit provisions at issue here will, accordingly, affect an increasing number of business entities, many outside the large manufacturing sectors.

STATEMENT OF INTEREST OF *AMICI*

Pursuant to Rule 36 of the Rules of the Supreme Court, *amici* American Iron & Steel Institute, American Petroleum Institute, California Council for Environmental and Economic Balance, Chamber of Commerce of the United States, Edison Electric Institute, Kitchen Cabinet Manufacturers Association, Michigan Manufacturers Association and The Society of the Plastics Industries (collectively, "industry *amici*"), file this brief in support of Petitioner The Steel Company. *Amici*, representing a broad spectrum of industry in the United States, support Petitioner's position seeking reversal of the decision below on the grounds that citizen suits under EPCRA may not be brought to impose civil penalties for wholly past violations. This brief is submitted to supplement Petitioner's argument by providing additional perspective on the consequences of applying the decision below to the broader industrial community. [2/]

Amicus American Iron & Steel Institute ("AISI") is a trade organization representing North American manufacturers, processors and other producers of iron and steel and related products. Virtually every domestic member of AISI is subject to regulation under EPCRA and parallel state laws. AISI's 50 member companies represent approximately 70% of steel production in the United States. AISI represents the views of its members before courts and regulatory agencies on issues of law and public policy that are of significant concern to them.

Amicus American Petroleum Institute ("API") is a trade association whose membership includes over 300 companies involved in all aspects of the petroleum industry, including exploration, production, transportation, refining and marketing. Many API members are regulated under EPCRA. API is

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[2/] Letters confirming that the Petitioner and Respondents consent to the filing of this brief have been filed with the Clerk of the Court.

an advocate on important issues of public policy before courts, legislative bodies, regulatory agencies and other forums.

Amicus California Council for Environmental and Economic Balance ("CCEEB") is a private, non-profit coalition of organized labor and businesses in California. CCEEB was established in 1973 and has been an advocate before legislative and regulatory forums for solutions to achieve California's environmental and economic goals.

Amicus Chamber of Commerce of the United States (the "Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, sector and region. Ninety-six percent of the Chamber's members are businesses with less than 100 employees. The Chamber regularly advocates the interests of its members in court on environmental issues of national concern to the business community.

Amicus Edison Electric Institute ("EEI") is the association of investor-owned electric utilities in the United States and their industry associates worldwide. EEI's U.S. members serve 99% of all customers served by the investor-owned segment of the electric utility industry. They generate about 78% of all the electricity generated by electric utilities, and service 76% of all ultimate customers in the Nation. EEI members are regulated under EPCRA. EEI is a frequent advocate on behalf of its members' interests in connection with important issues of law and policy that arise before courts, legislative bodies and regulatory agencies.

Amicus Kitchen Cabinet Manufacturers Association ("KCMA") is a voluntary non-profit trade association founded in 1955. Currently, KCMA represents over 350 members who manufacture kitchen cabinets and bath vanities, countertops and other decorative laminate products, or supply goods and services to such manufacturers. Fifty-five percent

of KCMA members report annual sales under $5 million and 75% report sales under $10 million (annual industry sales are estimated at over $5.5 billion). KCMA conducts research and educational programs, and represents its members' interests in important judicial, legislative and regulatory matters.

Amicus Michigan Manufacturers Association ("MMA") is a business association of private Michigan employers, studying matters of general interest to its members, promoting their interests and the interests of all Michigan employers and the general public in the proper administration of laws relating to its members, and otherwise promoting the general business and economic welfare of Michigan. MMA's more than four thousand members employ 90% of the industrial work force in Michigan -- over one million people. An important aspect of MMA's activities is representing its members as *amici curiae* in a broad range of matters before the courts.

Amicus The Society of the Plastics Industries, Inc. ("SPI"), is a trade association of nearly 2,000 members representing all segments of the plastics industry in the United States. SPI's business units and committees are composed of plastics processors, raw material suppliers, machinery manufacturers, moldmakers and other industry-related entities. Founded in 1937, SPI serves as the voice of the plastics industry before each level of government in matters of concern to SPI members.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Gwaltney,* this Court ruled that citizen suits may not be maintained for wholly past violations of the Clean Water Act ("CWA"). But the Seventh Circuit concluded that the language of EPCRA's citizen suit provision is distinguishable from the CWA and the reasoning underlying *Gwaltney* "is no longer as compelling as it was when *Gwaltney* was decided." 90 F.3d at 1244; *see also id.* at 1242. Industry *amici* disagree on both points. In ruling that EPCRA section 326 authorizes citizen suits for wholly past violations, the Seventh Circuit

suggested that EPCRA's citizen suit provision "does not point clearly to the present tense as its counterpart [CWA § 505, 33 U.S.C. § 1365] does in the Clean Water Act." *Id.* at 1243. Therefore, according to the court of appeals, section 326 of EPCRA is not limited to ongoing noncompliance. *Id.* The court reasoned that the mandatory pre-suit notice provision in section 326 was not intended to allow the would-be defendant to cure the alleged noncompliance and thus render a citizen suit unnecessary. If the converse were true it would, according to the Seventh Circuit, "render the citizen enforcement provision [of EPCRA] virtually meaningless" because "citizens would have no real incentive to incur the costs of learning about EPCRA, investigating suspected violators, and analyzing information. Put simply, if citizens can't sue, they can't recover the costs of their efforts." *Id.* at 1244.

The Seventh Circuit's holding that federal courts may hear EPCRA citizen suits even though compliance has been achieved prior to and without the necessity of a suit is flawed in three principal respects. First, the decision erroneously considered extrinsic evidence in interpreting EPCRA's citizen suit provision. EPCRA clearly provides that wholly past violations are not actionable, thus rendering the use of extrinsic evidence both unnecessary and improper. Second, even if the Seventh Circuit had been correct in resorting to extrinsic aids to construe EPCRA's citizen suit provision, the court misapplied those aids and failed to recognize that in crafting EPCRA's citizen suit provision, Congress used the template that underlies essentially all environmental citizen suits, and which this Court has held does not authorize citizen suits for wholly past violations. Finally, assuming that EPCRA could nevertheless be construed to allow private suits for wholly past violations, such an interpretation would fail to satisfy the

"irreducible minimum" requirement for standing to sue under Article III of the Constitution. [3/]

ARGUMENT

I. CONSISTENT WITH THIS COURT'S RECOGNITION OF THE LIMITS CONGRESS INTENDED FOR ENVIRONMENTAL ENFORCEMENT BY CITIZENS, EPCRA'S PLAIN LANGUAGE MAKES CLEAR THAT FEDERAL COURTS LACK JURISDICTION OVER CITIZEN SUITS FOR WHOLLY PAST VIOLATIONS

A. EPCRA's Plain Language Dictates That Citizens May Not Sue For Wholly Past Violations

This is a straightforward statutory interpretation case. *Atlantic States v. United Musical Instruments*, 61 F.3d 473. That is because the plain language of section 326 of EPCRA authorizes citizen suits only "for failure to . . . [c]omplete and submit an inventory form under Section 11022(a) [EPCRA § 312(a)] [and] . . . a toxic chemical release form under Section 11023(a) [EPCRA § 313(a)]." Here, as of the date the underlying suit was filed, The Steel Company had "completed and submitted" all necessary forms. The Seventh Circuit, therefore, should have affirmed the district court's decision in favor of Petitioner, without resort to extrinsic aids. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Isbrandtsen Co., Inc. v. Johnson*, 343 U.S. 779 (1952)(court bound to give effect to expressed intent of legislature).

More specifically, section 326 of EPCRA provides that "any person" may commence a civil action on his own behalf against "[a]n owner or operator of a facility for failure to do

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[3/] Affirming the Seventh Circuit would expose thousands of small businesses to costly litigation and legal expense despite good-faith efforts to comply and prompt action to correct previous noncompliance.

any of the following," including the failure to "complete and submit" the forms described in sections 312(a) and 313(a) of EPCRA. But here there is no allegation that Petitioner failed to "complete and submit" either of the required forms prior to commencement of CBE's suit. Accordingly, the district court had correctly ruled in this case -- in accordance with this Court's *Chevron* decision -- that under the plain language of the statute the court had no jurisdiction to hear CBE's suit.

Nevertheless, to buttress its contrary interpretation, the Seventh Circuit noted that section 326 authorizes a citizen suit for failure to complete and submit the required forms "under" sections 312(a) and 313(a). The court concluded that this use of the term "under" was a shorthand by which Congress intended to incorporate the timing provisions of sections 312(a) and 313(a) into the "complete and submit" provision of section 326, thereby expanding citizen suit jurisdiction to include cases where compliance had been achieved prior to suit but not in conformity with those timing provisions. *See* 90 F.3d at 1243.

As recognized by the Sixth Circuit in *Atlantic States v. United Musical Instruments*, the preceding interpretation of the word "under" is very strained. *See* 61 F.3d at 475. Indeed, it would have required the insertion of only a single word -- "timely," after the word "submit" in section 326 -- to have stated clearly the intention inferred by the Seventh Circuit. The legislature's failure to insert that single word suggests that the word was not intended to be there and, thus, that Congress did not intend that EPCRA citizen suits would be brought where the subject reports had already been filed prior to such a suit. *Water Quality Ass'n Employees' Benefit Corp. v. United States*, 795 F.2d 1303 (7th Cir. 1986); *cf.*, *Bennett v. Spear*, 65 U.S.L.W. 4201, 4204 (U.S. Mar. 19, 1997) (Court must take the term "any person" at "face value" in interpreting Endangered Species Act citizen suit provision).

Moreover, the notion that Congress used such a shorthand method to make all of the substantive requirements of EPCRA compliance enforceable by citizens on the same basis as the federal government is highly suspect. Contrary to the Seventh Circuit's reasoning, it is well-understood that "under" simply means "by reason of the authority of." *See Archestani v. I.N.S.*, 502 U.S. 129, 135 (1991). It is precisely for such reasons that "attribution of significance" to the term "under" in the Equal Access to Justice Act struck the District of Columbia Circuit as merely "wishful thinking." *St. Louis Fuel & Supply Co., Inc. v. F.E.R.C.*, 890 F.2d 446, 450 (D.C. Cir. 1989).

Finally, the Seventh Circuit's assertion, 90 F.3d at 1243, that the district court's plain language interpretation "would render gratuitous the compliance dates for initial submissions which Congress placed" in the statute is simply wrong. The Seventh Circuit borrowed this notion, apparently without consideration, from *Atlantic States Legal Foundation, Inc. v. Whiting Roll-Up Door Manufacturing Corp.*, 772 F. Supp. 745, 750 (W.D.N.Y. 1991). Although apparently not considered by the Seventh Circuit, a regulated entity such as Petitioner that misses an EPCRA filing deadline faces the specter of a potential government enforcement action long after a belated filing is made. [4/] Thus, the suggestion that the plain meaning interpretation would render compliance with EPCRA's filing dates "gratuitous" simply disregards the practical realities that govern here.

In short, the plain language of the EPCRA citizen suit provision establishes that Congress intended to limit such suits to cases of ongoing failures to "complete and file" the requisite reports. There was no failure to "complete and file" in this case,

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[4/] Although its applicability to EPCRA has not been specifically addressed, *see Atlantic States v. United Musical Instrument*, 61 F.3d at 475 n.4, a five-year statute of limitations generally applies to federal actions for assessment of civil penalties. *See* 28 U.S.C. § 2462.

and the district court, accordingly, correctly concluded that it lacked jurisdiction.

B. Section 326 Of EPCRA Was Based On The Same Citizen Suit Template That This Court Ruled In *Gwaltney* Does Not Authorize Citizen Suits For Wholly Past Violations

EPCRA is a public disclosure statute and contains no substantive pollution control requirements. The Seventh Circuit would nevertheless interpret EPCRA as conferring greater citizen enforcement authority than is available under the substantive environmental statutes.

The Seventh Circuit disregarded the fact that EPCRA's language is remarkably similar to the citizen suit provisions of the CWA and other environmental laws. Although the Seventh Circuit identified minuscule differences between the citizen suit provisions of EPCRA and the CWA, those differences are insignificant (and certainly do not suggest, as assumed by the Seventh Circuit, that Congress intended that citizen plaintiffs would have *greater* enforcement authority under an information sharing statute than under the substantive environmental laws). For example, the Seventh Circuit noted that EPCRA's venue provision, section 326 (b)(1), uses the past tense of "occur" (*i.e.*, citizen suits "shall be brought in the district court for the district in which the violation *occurred*" (emphasis added)). This is not a meaningful distinction because it is invariably true that *some* violation will have "occurred" in advance of a citizen suit -- otherwise the complaint could not have been filed (also, the distinction relates only to venue and not to the scope of jurisdiction). Although overlooked by the Seventh Circuit, a far more significant point is the use of the present tense in the EPCRA citizen suit provision's requirement for pre-suit notification to "the State in which the alleged violation *occurs*." § 326(d)(1) (emphasis added). This use of the present tense clearly signals a

legislative intent that EPCRA citizen suits would address ongoing violations.[5/]

In this connection it is particularly important to note that in crafting section 326, Congress relied on its well-defined environmental citizen suit template. *See Hallstrom v. Tillamook County*, 493 U.S. at 23 n.1. Conforming to the pattern of the CWA and other environmental statutes, section 326 requires notice to the federal government, the affected state and the alleged violator at least sixty days in advance of filing suit. Just as is the case under those other environmental statutes, EPCRA prohibits citizen suits where the government has already addressed the noncompliance in question. Furthermore, and again like other environmental laws, EPCRA authorizes federal courts to take jurisdiction without regard to such matters as the amount in controversy or diversity of citizenship. Put another way, EPCRA's citizen suit provision is directly analogous to the citizen suit provisions of the CWA and other environmental statutes, and should be so interpreted. While those statutes give the federal government authority to seek enforcement for wholly past violations, they do not give that authority to private plaintiffs and neither, therefore, does EPCRA.

II. EVEN INTERPRETED IN LIGHT OF EXTRINSIC AIDS, THE SEVENTH CIRCUIT'S RULING THAT FEDERAL COURTS HAVE JURISDICTION OVER PRIVATE CITIZENS' CLAIMS OF WHOLLY PAST VIOLATIONS DOES NOT WITHSTAND SCRUTINY

As already discussed, this is a "plain language" case; resort to extrinsic aids is, therefore, unnecessary (and should not have been relied on by the Seventh Circuit). Nevertheless,

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[5/] The Seventh Circuit erroneously suggests that this use of "occurs" in section 326(d)(1) is not "cast in the present tense." 90 F.3d at 1244. This error is fundamental and further undermines the court of appeals' "plain meaning" analysis.

approaching the case on the same basis as the court of appeals, neither the Clean Air Act ("CAA") Amendments of 1990, EPCRA's legislative history, nor the policy goals served by EPCRA's citizen suit provision -- all of which were relied on by the Seventh Circuit -- produces a result different from the plain meaning interpretation of section 326 of EPCRA.

To begin, confronted with this Court's decision in *Gwaltney* that a citizen suit under the CWA cannot be brought with respect to wholly past violations, the Seventh Circuit engaged in an erroneous argument that *Gwaltney* "is no longer as compelling." 90 F.3d at 1244. The Seventh Circuit's premise for that position is the CAA Amendments of 1990, pursuant to which citizen suit enforcement authority is defined to include certain violations of a "repeated" nature. With that premise, the court reasoned that Congress intended that *all* wholly past violations, under *all* environmental statutes, would be subject to citizen suit enforcement. 90 F.3d at 1244. While the CAA Amendments of 1990 make certain "repeated" violations actionable in a citizen suit under CAA section 304(a)(1), [6] the Seventh Circuit was certainly incorrect in suggesting that Congress's action in amending the CAA invalidates this Court's *Gwaltney* decision or applies retroactively to EPCRA, an entirely separate statute enacted four years prior to the 1990 CAA amendments.

In this connection it should be noted that the same theory relied on by the Seventh Circuit had been presented earlier to the Sixth Circuit in *Atlantic States v. United Musical Instruments*, and was flatly rejected by that court. The Sixth Circuit explained that such reasoning

[6] This matter is unclear, as indicated by recent district court decisions. For example, a district court in Georgia concluded that Congress did not intend wholly past violations to be redressable when it amended CAA section 304(a)(1) to allow suits for "repeated" violations. *Satterfield v. J.M. Huber Corp.*, 888 F. Supp. 1561 (N.D. Ga. 1994).

> . . . is unpersuasive since one can argue with at least equal force that by amending the Clean Air Act, but failing also to amend EPCRA, Congress intended to limit EPCRA's citizen suit provision to violations existing at the time suit is filed. Allowing citizen suits for past violations would render superfluous EPCRA's requirement of sixty-days' notice to the alleged violator. In the absence of explicit congressional language mandating such a result -- as in the amended Clean Air Act -- we must reject [plaintiff's] argument.

61 F. 3d at 477. In short, the CAA Amendments of 1990 are simply irrelevant to the issue before this Court. [7]

In contrast to the Seventh Circuit's misplaced reliance on extrinsic aids, there is abundant evidence that Congress included the mandatory sixty-day pre-suit notice period in EPCRA for the precise purpose of providing regulated entities with an opportunity to come into compliance, thus rendering a citizen suit unnecessary. As this Court explained in *Gwaltney*:

> It follows logically that the purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit. If we assume, as respondents urge, that citizen suits may target wholly past violations, the requirement of notice to the alleged violator becomes gratuitous.

484 U.S. at 60. "Any other conclusion would render incomprehensible [the statute's] notice provision." *Id.* at 59. *Ac-*

[7] Industry *amici* agree with Petitioner that, to the extent Congress attempted to make wholly past violations actionable in citizen suits under CAA section 304, such action would conflict with Article III's limitations on standing to sue. *See, e.g., Gwaltney*, 484 U.S. at 70-71 (Scalia, J., concurring in part and concurring in judgment).

cord Hallstrom v. Tillamook County, 493 U.S. at 29 (purpose of citizen suit notice provision is to provide alleged violator with opportunity to bring itself into compliance and render a citizen suit unnecessary, thus striking a balance between encouraging citizen enforcement and avoiding burdening the federal courts with excessive citizen suits). The reasoning of the Seventh Circuit cannot be squared with this Court's precedents. [8/]

Industry *amici* also note that the Seventh Circuit further reveals its misunderstanding of the purpose of citizen suits when the court states that there would be no incentive to investigate noncompliance with EPCRA if a suit could be cut off by belated compliance and citizens "can't recover [their] costs," *i.e.*, costs of suit and attorney fees. 90 F.3d at 1244. Had Congress intended that citizens should have such additional incentives as an inducement to investigate potential noncompliance, it could have added "bounty hunter" provisions to EPCRA (as it has in other statutes). Moreover, although overlooked by the Seventh Circuit, EPCRA section 326, like other citizen suit provisions, expressly precludes a would-be citizen plaintiff's opportunity to recover pre-suit investigative costs by foreclosing a citizen suit when the government steps in and files an enforcement action during the mandatory pre-suit notice period. In sum, the Seventh Circuit's suggestion that only by allowing EPCRA citizen suits

[8/] The Seventh Circuit speculates that Congress intended the notice required by section 326(d) of EPCRA to "giv[e] an alleged violator a chance to correct the citizen's information." 90 F.3d at 1244. It would be strange indeed if Congress had had such a limited purpose in mind given that EPCRA's notice provision is essentially the same as the citizen suit notice provisions of the numerous other environmental statutes. Under those other statutes one of the principal purposes of the pre-suit notice requirement is to provide an opportunity to cure the alleged violations.

for wholly past violations will there be an incentive for such citizen suits is invalid. [9/]

III. THE SEVENTH CIRCUIT'S DECISION WOULD CONFER STANDING TO SUE IN CIRCUMSTANCES WHERE ARTICLE III DOES NOT

Finally, and independent of the preceding points, industry *amici* join The Steel Company's argument that CBE lacks standing under Article III of the Constitution to have its EPCRA suit heard. *Amici* write separately (and briefly) on Article III standing due to the importance of this issue.

A. The issue of standing "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Bennett*, 65 U.S.L.W. at 4203. To satisfy the "case or controversy" requirement of Article III, which is the "irreducible constitutional minimum" for standing, a plaintiff must demonstrate that it has suffered "injury in fact," that the injury is "fairly traceable" to the actions of the defendant, and that the injury will likely be redressed by a favorable decision. *Id.* This test is not satisfied where the plaintiff seeks redress for wholly past violations. Under the view implicit in the Seventh Circuit's opinion, Respondent CBE is deemed to have a personal stake in the litigation suffi-

[9/] *Amici* also note that the Seventh Circuit's erroneous rationale would apply equally to the Clean Water Act, and has therefore necessarily been refuted by *Gwaltney*.

In addition, contrary to the courts of appeals, EPCRA's legislative history does not support the view that wholly past violations were intended to be subject to citizen suits. The legislative history of EPCRA is sparse and nowhere suggests that Congress intended to depart from its standard approach of building into environmental citizen suit provisions a "cure period" following notice of intent to sue. Indeed, as this Court emphasized in *Hallstrom*, EPCRA's citizen suit provision is typical of a number of other federal environmental laws, *see* 493 U.S. at 23 & n.1, and the substantial departure envisioned by the Seventh Circuit would certainly have been accompanied by an explanation.

cient to satisfy Article III simply because a federal court could impose civil penalties payable to the United States or declare that in the past The Steel Company had not been in compliance with EPCRA. This view contradicts Supreme Court precedent and exposes industry *amici* to a wave of litigation from citizens seeking to vindicate a generalized interest in environmental matters.

In seeking civil penalties but not injunctive relief (because there is nothing to enjoin), CBE acted not on its own behalf but rather on behalf of a broader public interest. Because it is undisputed that The Steel Company was in compliance before CBE's suit was filed, CBE's sole interest in the outcome of this case is to have the federal government punish The Steel Company for delayed compliance. Under the rulings of this Court, however, such an interest is insufficient to confer standing. That is because an interest shared generally with the public at large in the proper implementation of or adherence to public laws is not the "concrete and particularized" injury that is the predicate for Article III standing. *See Arizonans For Official English v. Arizona,* 117 S. Ct. 1055, 1067 (1997), (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). [10/] Moreover, this Court has consistently held that a prospective award of attorney fees does not confer Article III standing where the plaintiff alleges only wholly past violations. *Diamond v. Charles*, 476 U.S. 54, 70-71 (1986) (standing requires injury with nexus to substantive character of the statute at issue; claim for fee award insufficiently related to Illinois law regulating abortion).

[10/] *See also Gwaltney*, 484 U.S. at 70-71 (Scalia, J., concurring in part and concurring in the judgment) ("If it is undisputed that the defendant was in a state of compliance when this suit was filed, the plaintiffs would have been suffering no remediable injury in fact that could support suit" and "there cannot possibly be standing to sue"). In this connection, it should also be noted that the United States has previously argued before this Court that Article III standing is absent where a citizen plaintiff's suit is based on wholly past violations. *See* Brief of the United States as *Amicus Curiae* Supporting Affirmance, Case No. 86-473, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, at n. 34.

Limited, therefore, to seeking punishment of The Steel Company through penalty payments to the government, Respondents' suit does not seek redress for concrete, particularized injury to CBE, but rather vindication of an interest shared equally by the public at large. Article III, however, excludes vindication of such generalized interests from the purview of the federal courts. Put another way, the generalized interest that CBE seeks to advance is identical to the "undifferentiated public interest" and is not one that federal courts were intended to hear. *Marbury v. Madison*, 5 U.S. (Cranch) 137 (1803). If such generalized concerns could be the premise for federal court jurisdiction the litigation burden would be overwhelming and the effect on the rights of the public deleterious. [11/]

B. Although the Seventh Circuit did not examine the Article III flaw in CBE's case, its assumption, discussed *supra*, that absent the recovery of attorneys fees citizen groups will not investigate potential EPCRA noncompliance, suggests that the Seventh Circuit projects a role for environmental citizen suits that is fundamentally different from that recognized in previous decisions of this Court. The Seventh Circuit (and certain district courts) envision citizen suits as private actions and focus on the need to provide a reward for investigating wrongdoing. Of course, when the recovery of fees is the focus, the matter is in essence a private concern and the standing issue is less problematic. Industry *amici* acknowledge that had Congress premised EPCRA's citizen suit provision (or, for that

[11/] Lawyers at the U.S. Environmental Protection Agency have noted the ease with which EPCRA citizen suits in particular can be filed and prosecuted, calling such cases "a rewarding and lucrative practice area for private attorneys general." M.J. Walker & J.D. Jacobs, "EPCRA Citizens Suits: An Evolving Opus with a Discordant Note," *The Journal of Environmental Law & Practice* (Jan./Feb. 1997) at 20.

matter, other citizen suit provisions) on a private bounty mechanism, there could be honest debate about whether wholly past violations would be sufficient for Article III standing. But Congress intended achieving compliance with public law as the first priority of citizen suits, and collection of attorneys fees is secondary. Congress assumed that citizens would investigate environmental wrongs for the benefit of the public, not merely to collect fees. With this relationship properly understood, a serious argument that wholly past violations are sufficient to support Article III standing cannot be maintained.

As a consequence of the Seventh Circuit's ruling, EPCRA enforcement authority will be shared equally by EPA and citizen groups. This is not what Congress intended.[12/] In *Gwaltney*, the Court noted that where EPA had issued a compliance order and agreed to undertake "some extreme corrective action" a citizen should not be allowed to sue months or years later to seek the penalties that EPA chose to forego. 484 U.S. at 61. With the Seventh Circuit's decision in place, private plaintiffs would have license to sue even where EPCRA violations were cured prior to the suit and had been subject to EPA enforcement. *Id.* But as this Court emphasized in *Gwaltney*, that "interpretation of the scope of the citizen suit would change the nature of the citizens' role from interstitial to potentially intrusive." *Id.* This is not the direction in which the federal courts should take EPCRA.

[12/] It should be noted that EPA's enforcement of EPCRA has been diligent. More than 200 administrative enforcement actions were concluded in 1995. *EPA, FY 1995 Enforcement and Compliance Assurance Accomplishments Report* (1996). EPA Region V declined to file an enforcement action against Petitioner in this matter, obviously viewing the situation as a very small company's relatively minor violation that was promptly cured. But Region V has been far from lax in enforcing EPCRA; as of March 3, 1997, it had filed 86 separate complaints for EPCRA reporting violations, resulting in 71 settlements and the imposition of $3.5 million in total fines. The federal government's EPCRA cop is on the beat.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to reverse the judgment of the court of appeals.

Respectfully submitted,

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